SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1346

JOHN L. McLUCAS, Secretary of the Air Force, *et al.*,

Appellants,

—v.—

RAYMOND G. DECHAMPLAIN,

Appellee.

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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BRIEF FOR AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

Interest of Amicus[1/]

The American Civil Liberties Union is a nationwide, non-partisan organization of more

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1/ Letters from the parties, consenting to the filing of this brief, have been lodged with the Clerk of the Court.

than 250,000 members devoted solely to protection of the Bill of Rights. Since the earliest days of its existence, more than half a century ago, the ACLU has provided support and representation to criminal defendants asserting their Fifth and Sixth Amendment rights to due process of law and effective assistance of counsel. In recent years the ACLU has also participated in litigation challenging misuse of the classification system to invade constitutional rights. One of the issues in this case--and the only one we address in this brief--involves a serious and far-reaching restriction on the right of a citizen to prepare a defense against criminal charges based on classified evidence.

Question Presented

In a criminal prosecution brought pursuant to 18 U.S.C. § 793, must the government provide the defendant and his chief defense counsel with unlimited access to and use of relevant evidence, subject to a protective order against disclosure to those not involved in the defense of the case?

Statement of the Case

DeChamplain is a master sergeant in the United States Air Force. He was arrested on July 2, 1971 on three charges, including copying and attempting to deliver classified documents affecting the national defense to unauthorized persons, in violation of 18

U.S.C. § 793.2/ He has been held in confinement continuously since the date of his arrest.

In November 1971 DeChamplain was tried and convicted as charged by a general court-martial. His conviction was reversed on October 5, 1972 by the Air Force Court of Military Review, on the ground that it was based on a coerced and unlawful confession. United States v. DeChamplain, ACM 21034, 46 C.M.R. 784. The Court of Military Appeals affirmed the reversal on February 22, 1973. 22 U.S.C. M.A. 150, 46 C.M.R. 150.

On May 30, 1973 the Air Force brought the same charges against DeChamplain, modified to reflect the reversal of his earlier conviction. Thereafter, DeChamplain retained civilian counsel to represent him at his second court martial. Counsel requested unrestricted access to the record of the prior proceedings and to the documents upon which both the earlier and the subsequent charges were based. The Air Force refused to grant De Champlain's counsel access to the "classified" portions of the prior proceedings or to the documents in question, and insisted that counsel would have to obtain a security clearance. The Court of Military Appeals declined to review this determination. DeCham-

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2/ He was also charged with violations of Article 134, U.C.M.J., 10 U.S.C. § 934, and 50 U.S.C. App. § 783(b); and Article 92, U.C.M.J., 10 U.S.C. § 892.

plain v. McLucas, 22 U.S.C.M.A. 462, 47 C.M.R. 552.

On September 20, 1973 the government announced a final decision on access. Counsel would be absolutely barred from access to fifteen documents which had been introduced at DeChamplain's first court-martial, as well as all references to those documents in the record of that trial. The government sought to avoid the defense's objections by unilaterally dropping the specifications relating to the fifteen documents.

Counsel also was not to be permitted to receive copies of the nine documents (or the references to them in the prior record of trial) upon which the remaining outstanding charges were based. He was to be allowed, however, to look at the documents under severe restrictions. He could examine the documents and discuss their contents only in the presence of officials holding appropriate security clearances, and only at a time and place chosen by the government. He would not be entitled to retain notes with respect to classified matters from such documents for use in his office in preparation for trial, but would have to surrender such notes to be "secured" by the government. Moreover, he would have to submit all his notes to government personnel for decision as to whether or not they relate to classified material and must be "secured".

No other members of the civilian defense team, including associate attorneys, expert

consultants, and potential expert witnesses could observe the documents or even receive second-hand information about their contents, with the exception of one associate attorney and one legal secretary. Finally, counsel could not discuss any aspects of the documents with his associate or with military counsel in his office or home; he could only discuss such information in a designated government office and then only with individuals with the proper security clearances. Nor could DeChamplain retain his classified notes for delivery to his civilian counsel or otherwise make written reference to the classified exhibits or to other relevant sections of the record.

The military judge approved the terms of the government's restrictions upon access without modification by order dated October 13, 1973.

Prior to the scheduled commencement of his court martial on November 15, 1973, DeChamplain obtained an injunction from the United States District Court for the District of Columbia requiring the Air Force, inter alia, to grant his attorney unlimited access to the documents and the record of the prior trial, subject to a judicial protective order against disclosure to third parties. The Court held that the access limitations would "effectively handcuff... retained civilian counsel" and thereby deprived DeChamplain of his Fifth and Sixth Amendment rights. The government has ap-

pealed to this Court.3/

Introduction

In its opinion, the District Court observed that:

> The government must be put to the choice. It may not bring serious charges against an individual and at the same time withhold crucial evidence from the accused [367 F. Supp. at 1295].

Without directly disputing the validity of that statement, the government contends that its attempted restrictions on defense counsel's access to the nine documents upon which the current charges against DeChamplain are based do not amount to "withholding of evidence". The government further asserts that the remaining fifteen classified documents, purportedly found on DeChamplain's person at the time of his arrest may now be completely suppressed, notwithstanding their introduction as prosecution exhibits at DeChamplain's first trial.

3/ The issues on appeal other than access are not addressed in this amicus brief.

Argument

I.

THE DRASTIC RESTRICTION ON DEFENSE COUNSEL'S ACCESS TO THE VERY EVIDENCE ON WHICH THE PROSECUTION IS BASED CONSTITUTES A DENIAL OF DUE PROCESS AND EFFECTIVE ASSISTANCE OF COUNSEL.

The Air Force has failed to "come forward with any convincing justification, military or otherwise" [367 F. Supp. at 1295], for the drastic restrictions on defense counsel's access to and use of the nine documents underlying the charges against DeChamplain. Indeed, the sole paragraph in the government's brief referring to those restrictions boldly asserts that the Air Force seeks "a reasonable accommodation of the accused's interests and the military's legitimate interests in preventing widespread dissemination of such sensitive materials" [Gov't br., at 35]. However, the rights of a person accused of a crime to effective assistance of counsel and due process of law are not subject to any "accommodation" on terms dictated by the prosecution.

It is well established that in a criminal prosecution the government must either make all potentially exculpatory material in its possession available to the defense, or abandon the prosecution. See, e.g., Dennis v. United States, 384 U.S. 855 (1966); Brady v. Maryland, 373 U.S. 83 (1963); Rovario v. United States, 353 U.S. 53 (1957); Ashley v.

Texas, 319 F.2d 80, 85 (5th Cir. 1963), cert. denied 375 U.S. 931 (1963); Barbee v. Warden, 331 F.2d 842 (4th Cir. 1964); United States ex rel. Butler v. Maroney, 319 F.2d 622, 627 (3rd Cir. 1963). A fortiori, the government may not supress documents in a criminal prosecution "founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate." United States v. Andolschek, 142 F.2d 503, 506 (2d Cir. 1944).

By definition, cases of espionage fall within this category, for the corpus delecti of the offense is information, usually in documentary form, the possession and/or transmission of which may become punishable only upon a finding beyond a reasonable doubt that it falls within a multifaceted and rigorously circumscribed set of criteria. 18 U.S.C. § 793. See Gorin v. United States, 312 U.S. 19 (1940); Boeckenhaupt v. United States, 392 F.2d 24 (4th Cir. 1968), cert. denied, 393 U.S. 896 (1968); United States v. Drummond, 354 F.2d 132, 152 (2d Cir. 1965); United States v. Rosenberg, 195 F.2d 583 (2d Cir. 1952), cert. denied, 344 U.S. 838 (1952); United States v. Heine, 151 F.2d 813 (2d Cir. 1945). See generally, Edgar and Schmidt, The Espionage Statutes and Publication of National Defense Information, 73 COL. L. REV. 929 (1973). 4/ The prepara-

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4/ See discussion of the elements of the crime of espionage in Appellee's brief, at

tion of an effective defense to a charge of espionage, therefore, can only proceed on the basis of a thorough and rigorous analysis of the contents. line by line and word by word, of the materials at issue.

However, defendant's right to effective representation by counsel who has had adequate opportunity to prepare his case does not rest solely on the specific requirements of the espionage law, but is in itself an independent and indispensable ingredient of due process for all criminal trials. Since Powell v. Alabama, 287 U.S. 45, 57, 71 (1932), it has been clear that due process is violated when counsel is forced to proceed "under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case," a vital ingredient of which is "thoroughgoing investigation and preparation." Since Powell the federal courts have frequently reversed convictions where counsel's pretrial investigation of the facts has been inadequate, either as a result of his own dereliction, e.g., Jones v. Cunningham, 313 F.2d 347, 353 (4th Cir. 1963); Kott v. Green, 303 F. Supp. 821, 823 (N.D. Ohio 1968), or by virtue of external circumstances, e.g., Powell v. Alabama, supra; United States ex. rel. Sanders v. Ohio, 322 F. Supp. 28, 31 (S.D. Ohio 1971).

It should come as no surprise, therefore, that efforts by the prosecution or those allied with it to hinder or obstruct the preparation of the defense have met with

little favor. Such hindrance or obstruction has been found to exist even when defense counsel is barred by the government from obtaining material in the possession of third parties.

In Powell v. United States, 156 F. Supp. 526 (N.D. Cal. 1957), for example, defendants were charged with circulating and disseminating false information intended to cause insubordination and disloyalty among United States troops. The allegedly false statements concerned the purpose and effect of certain U.S. military operations during the Korean War. As in the case of an espionage prosecution, both the nature of the information involved and the degree and nature of scienter with which the acts charged may have been performed were vital elements of a potential defense. Powell's defense counsel, therefore, sought to investigate these elements of the case and applied to the State Department for visas to travel to North Korea and mainland China, where he desired to interview witnesses and collect relevant documents. The State Department refused to validate the defense attorney's passport, in adherence to current policy. The Powell court found the situation clear:

> So the United States has its choice. It can choose to adhere to its policy of non-issuance of such passports. Or it can decide that it is more important to prosecute this criminal case. If the former be its choice, it will mean a discontinuance of the present prosecution [156 F. Supp. at 530].

See also Coppolino v. Helpern, 266 F. Supp. 930 (S.D.N.Y. 1967), in which the Court enjoined a prosecution expert in a pending state murder trial from preventing a subordinate from discussing certain pathological findings and reports with defense counsel, who had sought to interview him in preparing the defense.

The government in this case concedes, as it must, that generally it may not withhold evidence or obstruct defense preparations, but it nevertheless contends that it has been necessary to do so here. The government's restricted access "rules" would compel defendant and his counsel to select one (and only one) associate lawyer, foreign policy expert, classification expert, and secretary, all of whom may read and discuss the documents only in the presence of appropriately cleared Air Force (i.e. prosecution) personnel, who shall also review any written work product and keep possession of whatever bears on the classified material. Finally, the trial and presumably all such "access" shall take place in Missouri.

As observed by the District Court, the restrictions sought to be placed here on counsel's access to and use of the corpus delicti of this case are tantamount to a "handcuffing" of the defense [367 F. Supp. at 1295]. These restrictions are completely at odds with due process and the right to effective assistance of counsel. Either the restrictions must be dropped or the prosecution abandoned.

II.

THE PROSECUTION'S WITHHOLDING OF OTHER POTENTIALLY EXCULPATORY DOCUMENTS FROM DEFENSE COUNSEL ALSO DEPRIVES DECHAMPLAIN OF DUE PROCESS AND ABRIDGES HIS RIGHT TO COUNSEL.

In addition to imposing crippling restrictions on defense counsel's access to the nine documents which constitute the corpus delicti of the offenses charged, the government flatly refuses to allow DeChamplain's defense counsel any access whatever to fifteen other classified documents found in defendant's possession at the time of his arrest. The government seeks also to suppress any references to such documents or their contents which appear in the record of DeChamplain's first trial, at which all were introduced as evidence by the prosecution, claiming that the prosecution has absolved itself of any obligation to disclose these documents by withdrawing the charges concerning three of them and promising that none "will ... be introduced as evidence" at the second trial [Gov't br., at 36]. However, by abandoning its own reliance on the fifteen documents, the government has done nothing to alter the potentially exculpatory status of these materials, to which the defendant must have full access in order to prepare his defense.

The basic principle governing this aspect of the case was declared by this Court in Brady v. Maryland, 373 U.S. 83, 87 (1963):

We hold that the suppression by

> the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.

It is in the determination of what is "favorable to an accused" [373 U.S. at 87] that the adversary role of defense counsel is indispensable. Counsel's familiarity with the facts of the case and his loyality to and identification with his client provide the best assurance that no potentially fruitful line of defense will be left unexplored. For this reason, counsel's judgment as to the relevance of pertinent information to his case is to be preferred, even to that of the trial judge.

In Dennis v. United States, 384 U.S. 855 (1966), for example, the Court unanimously ordered that certain grand jury minutes containing prior testimony of key government witnesses be turned over to the defense for impeachment or any other purpose to which the defense might put them. In so doing the Court explicitly rejected an in camera screening of the minutes by the trial judge and stressed the role of defense counsel in deciding whether and how they might be used:

> [It is not] realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate pur-

> poses, however conscientiously made, would exhaust the possibilities. In our adversary system, ... [t]he determination of what may be useful for the defense can properly and effectively be made only by an advocate [384 U.S. at 875] [emphasis added].

See also Alderman v. United States, 394 U.S. 165, 184 (1969).

If it is "unrealistic" to allow a judge to determine the utility to the defense of relevant material, it would seem hardly less fanciful to permit the prosecution to do so, as the government proposes here. Nor can it seriously be contended that by merely excluding the material from the charges and its own case in chief the government can magically render the very items in possession of which defendant was arrested so tangential to his defense that his own attorney may be foreclosed from even seeing them. 5/

5/ In view of the restrictions placed on discussions of this material between and among civilian and military defense counsel, possible expert witnesses and the accused, the government's position that the accused's and his military counsel's memory of his first trial are tantamount to disclosure to civilian counsel [Gov't br., at 36] is absurd. These restrictions are specifically designed to prevent civilian counsel from

In Rovario v. United States, 353 U.S. 53, 64 (1957), the Court found particular unfairness in the prosecution's refusal to disclose to the defense the prior testimony of a confidential informant, who was:

> the only person, other than petitioner himself, who could controvert, amplify, or explain [the government's key witnesses'] report of [an incriminating] conversation.

Is it possible even for a moment to claim that fifteen out of twenty-four contraband items found on the defendant at the time of his arrest are not material which "could controvert, amplify, or explain" the nine other items upon which the formal charges against him are purportedly based?

"Where there is room for substantial doubt, the prosecution is not to decide for the Court what is admissible or for the defense what is useful." Griffin v. United States, 183 F.2d 990, 993 (D.C. Cir. 1950).

Under the facts of the instant case there can be no doubt, much less a substantial doubt, of the critical bearing on the defense of all of the documents found in DeChamplain's poss-

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5/ cont. acquiring any knowledge of the contents of the documents and are entirely effective in doing so.

ession at the time of his arrest, no matter how many or how few of them the government may choose to introduce. In such circumstances the prosecution's obligation to disclose is manifest. As Chief Judge Hand succinctly put it in United States v. Coplon, 185 F.2d 629, 638 (2d Cir. 1950), "we can see no significant distinction between introducing evidence against an accused which he is not allowed to see, and denying him the right to put in evidence on his own behalf."

In Coplon Judge Hand required defense access to records which he conceded bore only the most tenuous relationship to the trial record before him. That case also arose out of charges of conspiracy to violate the espionage laws. During the trial the government disclosed that it had conducted illegal wiretaps of defendant and others. While the prosecution made no attempt to introduce the fruits of the taps as evidence, it was obliged to demonstrate to the court that no "leads" from such taps led to evidence actually used at trial. The government turned over numerous documents and recordings to the defense for its use in developing suppress motions, but as to several documents it asserted a "state secrets" privilege and submitted them to the court for an in camera, ex parte determination as to whether they had "led" to any evidence introduced. The Second Circuit ruled unanimously that it was error not to have allowed the defense access to the wiretap records. The Court pointed out that:

> Few weapons in the arsenal of freedom are more useful than the power to compel a government to disclose the evidence on which it seeks to forfeit the liberty of its citizens. All governments, democracies as well as autocracies, believe that those they seek to punish are guilty; the impediment of constitutional barriers [is] galling to all governments when they prevent the consummation of that just purpose. But those barriers were devised and are precious because they prevent that purpose and its pursuit from passing unchallenged by the accused and unpurged by the alembic of public scrutiny and public criticism. A society which has come to wince at such exposure of the methods by which it seeks to impose its will upon its members, has already lost the feel of freedom and is on the path towards absolutism [185 F.2d at 638].

In the instant case, DeChamplain has more than a "flimsy grievance" when his attorney is forced to defend his client's freedom in total ignorance of most of the material in DeChamplain's possession when he was arrested, Without access to this material, due process and the right to counsel are a sham.

Conclusion

For the foregoing reasons, as well as the reasons fully set forth in appellee's brief, the appeal should be dismissed, or, alternatively the decision of the District Court with respect to the "access of documents" issue should be affirmed.

Respectfully submitted,

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